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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No 697

CAESAR BOTTONE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—v.—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on August 4, 1966, which affirmed a judgment of the United States District Court for the Southern District of New York convicting petitioner, and others, upon a jury verdict, on two substantive counts (counts 8 and 9), and one conspiracy count (count 10) of an indictment charging violation of 18 U.S.C. §§ 2314 and 2315.

Count 8 of the indictment charged the defendants there named, including this petitioner, with unlawfully, wilfully and knowingly transporting and causing to be transported in foreign commerce, goods, wares and merchandise of a value of $5,000.00 and more, to wit, quantities of tetracycline,

chlortetracycline and demethylchlortetracycline producing microorganisms, documents relating to the production of those drugs, quantities of a microorganism used in the production of triamcinolone and documents relating to the production thereof, knowing the same to have been stolen, converted and taken by fraud.

Count 9 charged the defendants named therein, including petitioner here, with unlawfully, wilfully and knowingly transporting and causing to be transported in foreign commerce, goods, wares and merchandise of a value of $5,000.00 or more, to wit, quantities of chlortetracycline producing microorganisms, knowing the same to have been stolen, converted and taken by fraud.

Count 10 charged a conspiracy on the part of petitioner and other defendants there named, together with named coconspirators not designated as defendants in that count, to violate 18 U.S.C. §§2314 and 2315, commencing about March 1, 1958 and continuing to the date of the filing of the indictment.

Petitioner was not named in any other count in the indictment. On January 20, 1966, petitioner was sentenced to a term of two years imprisonment on counts 8, 9 and 10, to run concurrently. Bail in the amount of $2,500.00 has been continued throughout these proceedings.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A, *infra*, pp. A1-A12. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1966 (App. C, *infra*, pp. A-15-A-16). A timely petition for rehearing and rehearing in banc filed by petitioner was denied by that Court on September 20, 1966 (Apps. D and E *infra*, pp. A-17-A-20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the crimes defined by 18 U.S.C. §§ 2314 and 2315, of transporting, receiving or disposing of stolen "goods, wares and merchandise" in interstate and foreign commerce, embrace the transportation, receipt or disposition of stolen intangible "trade secrets" or of documents not in themselves stolen which embody such stolen intangible "trade secrets".

2. Whether a defendant's Fifth and Sixth Amendment rights are violated where a third party, surreptitiously acting as a *de facto* agent for the Government, after the Government's investigation has focused upon the defendant, secures statements from the defendant for use by the Government, through interrogation exacted as the price for the defendant's obtaining relief from a substantial contempt judgment in favor of the third party, without advising him of the actual purpose of the interrogation or of his rights under the Fifth and Sixth Amendments, and the Government is then permitted to use such statements against the defendant at his trial on criminal charges.

3. Whether in the circumstances described in Question 2, *supra*, the defendant's Fifth and Sixth Amendment rights

are violated by the trial court's failure to order a full hearing as to the circumstances surrounding the securing of the statements in question and the voluntariness thereof, and by its failure to submit to the jury the issue of voluntariness.

'4. Whether in a criminal prosecution for transporting or receiving or disposing of stolen goods of the value of $5000 or more in interstate or foreign commerce, under 18 U.S.C. §§ 2314 and 2315, and for conspiracy to do so, the jury may be properly charged that in reaching its determination of the "market value" of the goods, as that term is used in 18 U.S.C. § 2311, it may take into consideration evidence of such matters as the cost of production, the cost of replacement, the value to the owner, the value under special circumstances and other matters not reasonably related to the market value of the materials involved.

5. Whether in a criminal prosecution for transporting or receiving or disposing of stolen goods in interstate or foreign commerce, under 18 U.S.C. §§ 2314 and 2315, or for conspiracy to do so, evidence of participation by a particular defendant in the transportation and disposition of the goods involved is sufficient to support his conviction where there is nothing in such evidence to show knowledge on his part that the goods have been stolen.

6. Whether in a criminal prosecution for transporting in foreign commerce a stolen pharmaceutical culture allegedly of the value of $5000 or more, under 18 U.S.C. § 2314, the conviction of the defendant may be sustained where there is no evidence that the particular culture transported by him was viable or of any potency or value at the time of the transportation and the only evidence bearing on the question shows that the culture transported was of no value.

7. The Question presented in the petition of co-petitioner Seymour Salb, and Question 3 presented in the petition of co-petitioner Nathan Sharff, concurrently filed in the companion cases arising out of the same judgment of conviction below, are incorporated herein by reference.

Statutes and Rule Involved

The statutes and rule here involved are 18 U.S.C. §§ 2311, 2314 and 2315; and Fed. Rules Cr. Proc., Rule 52(b). The pertinent portions thereof are set out in Appendix B, *infra*, pp. A-13-A-14.

Statement

As proof of the theft of the drugs and documents involved in the indictment, the Government relied upon the testimony of Sidney M. Fox, John Cancelarich, Leonard Fine and Joseph Gerace. Fox, a chemist with a Ph.D. in organic pharmaceutical chemistry, worked as a group leader in the chemical process improvement department of Lederle Laboratories, a subsidiary of American Cyanamid Co. at Pearl River, N.Y., from 1954 until September 1959. In that capacity he had occasion to work with the antibiotics tetracycline (TC), chlortetracycline (CTC) and demethylchlortetracycline (DMCTC), as well as other antibiotics and the steroid triamcinolone (284-8).* John Cancelarich, a chemical and industrial engineer, was employed at Lederle from 1952 through February 1961, except for the years 1954-56 when he was in the Army (824-25). While

* Numbers in parentheses, unless otherwise indicated, are references to the stenographic transcript of the trial below, three (3) copies of which have been filed with this Court, in lieu of appendices. Emphasis throughout this petition is supplied.

employed at Lederle he had assignments there with the pilot plant engineering group in chemical production and rose to the position of department engineer (826-27). Leonard Fine, an analytical chemist, holds degrees in chemistry, management and engineering and had worked in chemistry for various drug and scientific companies from 1943 to 1961, not including Lederle (1491-93). Joseph Gerace was employed at Lederle as a technician for 11 or 12 years until sometime in the year 1961 (1721-22).

Through Fox, the Government presented evidence designed to show that, while at Lederle, Fox stole crystals of triamcinolone, certain "intermediate" chemicals used in the production of that steroid and microorganisms for the production of TC, CTC and DMCTC. Fox also removed from Lederle certain documents relating to the procedures for producing these drugs, photocopied them at home, replaced the original documents and then used the photocopies as an aid in writing up processes for the production of these drugs. During the latter half of 1960 these writings were frequently made, using the same procedure, by Fox, Cancelarich and Fine together, with Cancelarich securing the documents from Lederle after Fox left that company. As is more fully developed below, it was these "write ups" which constituted the "documents relating to" the drugs here involved, which the indictment alleges were transported in violation of 18 U.S.C. § 2314.

Around August of 1960, Fox, Cancelarich and Fine organized a business known as Kim Laboratories. Kim was organized for various purposes, including legitimate ventures such as supplying hospitals and laboratories with chemicals and photocopy machines and supplies (831, 1565-

66.) From around August, 1960 until the latter part of that year, however, these three men also collaborated in writing up the aforementioned processes. Through Cancelarich it was shown that from around the time of the organization of Kim until his resignation from Lederle, Cancelarich too stole cultures for the production of these antibiotics, as well as additional documents, in connection with which the three followed the same practice of photostating them, returning the originals and then writing up, in their own language, the processes for production of these antibiotics.

In October 1960 Fox introduced Cancelarich and Fine to Elio Salvetti (832-833). Salvetti was named in the indictment as a defendant but did not appear at the trial. In late 1960, prior to a trip to Europe, Fox turned over to Cancelarich and Fine certain boxes containing, among other things, the cultures he had stolen and the write-ups of the procedures. In early 1961 Salvetti, Cancelarich and Fine broke with Fox and the three began to operate independently; Cancelarich and Fine kept the materials Fox had given them prior to his trip to Italy (410, 560, 843, 847, 1498, 1500-01, 1597).

Through the testimony of Fox, the Government offered evidence relating to Fox's dealings prior to and until early 1960 with the defendants Sharff and Salb, the latter being a chemist in partnership with Sharff in a business at that time known as Biorganic Laboratories. The Government's case as against those two defendants is treated in their petitions to this Court and will not be discussed here.

Bottone, after receiving his degree as a Doctor of Medicine from the University of Bologna, Italy in 1955, and after

a two-year period of internship and practice, entered upon a full time career in the pharmaceutical field (2198-2200). Although Dr. Bottone was born in the United States (in 1927), is married to an American citizen and has a four year old child born here, he had continuously resided and attended school in Italy between 1937 and 1955, except for his return to this country in 1953 to be married and his 1½ years service with the British 8th Army during World War II, upon the termination of which he received an honorable discharge (2195-99, 2201). With this background, Bottone's pharmaceutical career was concentrated in the international field and required numerous business trips yearly to Europe and even the Far East (2219-20).

From about the middle of 1958 to the end of 1959 Bottone was in partnership with Salvetti in the pharmaceutical field under the trade name of Kasal Trading Company (2214, 2230), and they had occasion during that period to do business with the Biorganic Company which was run by defendants Sharff and Salb (2207, 2231). Bottone's partnership with Salvetti was terminated at the end of 1959, when Bottone formed a new company known as Pan-Med Pharmaceutical Company, in which Salvetti had no interest, for the purpose of buying and selling medicinal chemicals (2200-01, 2214). Bottone thereafter continued doing a regular pharmaceutical business with Biorganic, through Sharff and Salb, until Biorganic went out of business in 1962 (2229).

The Government also offered evidence, through the witness Helmuth Wawretschek, that on April 10, 1961 he entered into an agreement with Sharff, Salb, Salvetti and Bottone providing for the purchase by the latter group of

a total of a 50% interest in Wawretschek's pharmaceutical company, Ankermann Italian, located in Milan, Italy. Bottone's investment in that company was not finalized, however, until sometime in May 1961 (2220). The investment originally had been suggested by Wawretschek to petitioner in March 1961 (675-678).

By way of background to that proposal, it should be noted that in the course of petitioner's pharmaceutical business, and in the period from 1957 until approximately February 1963, petitioner had purchased medicinal chemicals from Ankermann (661, 2202, 2203). Bottone and Mr. Wawretschek became good friends as well as business associates and on various occasions in the course of their business dealt with each other on a credit basis (2203, 2206).

Around May of 1960, Wawretschek had taken Bottone, Sharff and Salb on a tour of the Ankermann plant in Milan and at that time showed them the laboratory and equipment of the company and told them he had an unusual technique for selecting cultures, by which he could separate the better ones from the weaker strains. Wawretschek also told them he had the better microorganisms for TC, CTC and DMCTC and could select those that were best among them without having to run test fermentations in the plant (2435-38).

Wawretschek testified that in March 1961 he met Bottone in Berlin, where he suggested to petitioner that an American group be formed to be composed of Bottone, Sharff, Salb and Salvetti, and that they join "as a third party" in Ankermann by buying some stock of Ankermann. Petitioner thought this was a good idea and said that he would seek to bring it about in America (676-78, 746).

Thereafter, and on April 10, 1961, Wawretschek signed a "memorandum" of contract (Exhibit 39) with Sharff, Salb, Salvetti and Bottone, Salvetti signing for Bottone since the latter was not present at this meeting (678-79). The memorandum provided for the purchase of a 50% interest in Ankermann, for a total price of approximately $160,000. Bottone's portion of that investment amounted to $42,000, for which he received about 11% of the stock of the company. However, he never received any money from the company as a result of that investment and was never an officer, director or employee of the company (2204-05, 2339).

It was Cancelarich's understanding that Bottone was a party to the above-noted April 10 agreement and that the agreement "was a perfectly legitimate deal" (1293-94). Mr. Wawretschek was not named in the indictment either as a defendant or co-conspirator.

On the same date as the investment agreement, April 10, Wawretschek hired Cancelarich to work at Ankermann (1291-92). It was the Government's theory that Ankermann was to be supplied, through Cancelarich, with the stolen Lederle materials which Cancelarich and Fine had retained after their break with Fox, and that the investment in Ankermann was thus a part of a continuous conspiracy, alleged in Count 10, to obtain and transport to Italy stolen Lederle cultures and documents, which conspiracy had originated between Fox, Sharff and Salb; and the jury was so charged (e.g., 2726-27, 2741, 2821-23).

The Government contended that Bottone became a party to that conspiracy at or about the time of his investment in Ankermann, in that, the Government alleged, Bottone

then knew that Cancelarich would be providing Ankermann with stolen Lederle cultures (2761).

On April 16, 1961, Bottone drove Cancelarich to Idlewild Airport and paid for his airplane ticket to Italy. Cancelarich testified that on that date he had with him, in an attache case, two rolls of microfilm and some SOP's ["Standard Operational Procedures"] "that Dr. Fine (sic) and I had written up", along with some TC, DMCTC and F3 cultures originally obtained from Lederle, the DMCTC being in "lyophilized" form (863-64). It was the Government's contention that when Cancelarich made that trip Bottone knew that Cancelarich was carrying such, previously stolen, materials. This trip was thus the basis for Count 8 in the indictment, the first substantive count on which Bottone was convicted.

As to Count 9, the evidence showed that in September 1961 Bottone delivered a package to Wawretschek, in Italy, which Bottone had obtained from Sharff at Biorganic, and that the package contained certain test tubes. The Government contended at the trial that those test tubes contained live CTC microorganisms, originally stolen from Lederle, and that Bottone knew this when he transported and delivered the package to Wawretschek.

At the time of the crimes alleged in the indictment (essentially between 1958 and 1961) the drugs here involved were being produced and marketed under the trade names "achromycin" (TC), "aureomycin" (CTC), "declomycin" (DMCTC) and "aristocort" (triamcinolone). It was shown at the trial that, during and prior to those years, a great deal of knowledge was in the public domain as to methods of production, and other matters, relating to the

drugs here involved. The Government's "expert" witness, Dr. Theodore F. Scholz, Administrator of Chemical Process Improvement at the Lederle Laboratories division of American Cyanamid Co. since 1957, testified extensively as to that information which was in the public domain, and that which was secret, until the end of 1961, as respects the production and availability of the antibiotics tetracycline (TC), chlortetracycline (CTC), demethylchlortetracycline (DMCTC) and the steroid triamcinolone, involved in the allegations of the indictment. Those drugs were patented, and the process for their manufacture thus revealed, over a period of several years prior to the acts in issue at the trial (1899, 1950, 1974-75, 2025-28, 2050). At the time such patents became effective, the microorganisms involved in their production also became publicly available and anyone who was interested could get a sample of those cultures to develop them (732-33, 1900-03).

The testimony of one of the Government's own expert witnesses, Dr. Growich, a microbiologist at Lederle Laboratories, established that anyone could obtain, from the public depositories, a sample of the lower-yielding microorganism deposited there by Lederle, work with it to improve its yield and, even by simply using a different "medium" in experiments with these cultures, obtain a higher yield than that produced by the company depositing that culture (281, 283).

Chemicals necessary for producing these drugs, as well as the end products themselves, were being produced during those years from various sources and were frequently susceptible of independent chemical manufacture. Moreover, many important specifics as to the techniques and

ingredients necessary for obtaining higher yields in the production of these antibiotics were matters of public knowledge, or reasonably discoverable by one trained in this field, such as a microbiologist (1887-89, 1950, 1959-61, 1965-75, 1979-86, 2049-50, 2073-74, 2091-92, 2267, 2446-54).

The Government witness Wawretschek testified that he himself had obtained cultures from Lederle under a license agreement in 1952 for CTC, which were then used for the production of that drug in Europe (723-26, 728, 729-31).

In view of the familiarity of the names of these drugs to those in the field, the vast amount of detailed knowledge in the public domain as to the methods for their production, and the various sources of commercial production in fact of the drugs themselves and the chemicals required for their production, a showing by the Government that a particular defendant had knowledge of the specific *types* of drugs or processes with which he was dealing would have been insufficient to show knowledge on his part that those drugs or processes had in fact been stolen. As to this issue it was thus incumbent upon the Government to prove, as was its theory at the trial, that petitioner had knowledge of the fact that the materials had been stolen from Lederle and were not the products of independent research and discovery or of an authorized acquisition from Lederle (105, 900-01, 2692-93, 2761, 2767, 2801).

At the trial, Bottone took the stand and denied that he was involved in any of the matters contained in the indictment (2227-28), and denied that, during any of the meetings or conversations he had with any of the people involved in the instant case, there was any talk about procedures or cultures being stolen from Lederle (2401-02).

Bottone testified that during the period in which he did a regular business with Biorganic (1958 to 1962), he had occasion to be there about once each week or ten days (2228-29); he was under the impression that defendant Salb was an expert in the field of steroids and that Biorganic manufactured the product triamcinolone (2209, 2264).

Bottone testified that the first time he discussed cultures and processes with Sharff was when Sharff came to him and said he had cultures and processes and asked Bottone to try to find sources where he could sell them in Italy. Sharff told Bottone that he had microorganisms and a procedure for a new antibiotic which *he* had developed, without identifying it at the time, and that if Bottone could find a purchaser for it he would get a commission (2480-81). Sharff also told Bottone that he, Sharff, Salb and others had done extensive work and had discovered this antibiotic, but because it was very similar to an antibiotic that was about to be patented in the United States they did not have any hope of being able to use it here, so they wanted to use it in a country where United States patents did not apply, namely, in Italy. Bottone testified that was why they went to him and that they did not at any time ever mention the name Lederle to him (2483-84).

The evidence adduced by the Government in its effort to connect this petitioner with the conspiracy charged in Count 10, and the unlawful transportations charged in Counts 8 and 9, fell into two categories: (1) evidence relating to a certain meeting held at Biorganic on April 14, 1961, and (2) evidence relating to Bottone's activities generally prior to and after the April 14 date.

The Government relied heavily upon the testimony of its witnesses as to certain statements made by Concelarich and Fine at the April 14 meeting, in an effort to show that Bottone acquired knowledge at that meeting that Cancelarich and Fine were in possession of stolen Lederle materials, which they intended to transfer to and use at Ankermann. The Court of Appeals below expressly ruled that "it was not proved" at the trial that Bottone heard any of the conversations relied upon by the Government to show such knowledge on Bottone's part (App. A, *infra*, n. 3 at p. A-6).

The Court of Appeals held, however, that "the evidence of his (Bottone's) participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin," that is, what the Court of Appeals called "all this evidence of his comings and goings", "amply met the Government's burden" of showing the requisite guilty knowledge on Bottone's part. (App. A, *infra*, pp. A-5—A-6). That summary of the evidence as to Bottone, for the period prior to April 16, 1961 (the date alleged in Count 8), is set out, in full, as follows (App. A, *infra*, n. 3, pp. A-5—A-6):

> "Bottone's first significant appearance was in June, 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in

Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and micro-organisms at a lower price. In March, 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the micro-organisms and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, New York to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bottone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but *it was not proved that this was heard by Bottone,* who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N.J. to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes."

The remainder of the Court's summary of the evidence of petitioner's "comings and goings," for the period from April 16 through September, 1961, is treated *infra* (pp. 17-19, 20-1).

As to that April 16 trip (the subject of count 8), the evidence as to Bottone showed merely that on that date Cancelarich traveled to Fort Lee, New Jersey where he met with Bottone. Petitioner drove him to the airport and there bought an airplane ticket for Cancelarich and the latter flew to Italy (862-63, 865). The expense of the airline ticket was borne by petitioner's company, Pan-Med, which had an account with a travel agent for tickets to Europe. Mr. Wawretschek, while in New York in April 1961, had requested Bottone to provide Cancelarich with the tickets because of the latter's pending employment by Wawretschek (2217-19, 2224). Nothing was shown to have occurred between April 14 and 16, or on the ride to the airport, as respects this petitioner, which would have apprised him as to what Cancelarich was carrying with him to the airport (*supra*, p. 11) or that Cancelarich was carrying *anything* of an unlawful nature.

The Government also adduced testimony by Cancelarich and Fine as to certain dealings they and Bottone had with a Dr. Marpurgo from and after May 1961, when Marpurgo was representing the Italian drug firm MIBA.

Bottone testified that he had known Marpurgo since 1958 or 1959 and that in May 1961, while Bottone was in Milan to finalize his investment in Ankermann, Marpurgo visited him and asked him to recommend a chemical engineer for some consulting work to be done at MIBA. Petitioner then telephoned Cancelarich, who he had been told was a chemical engineer (2220-2221, 2358). The facts, as to what occurred thereafter, were found by the Court of Appeals below to be as follows (App. A, *infra*, n. 3 at p. A-6):

> "Bottone introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who

was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's (sic) MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo."

As respects the incidents above-noted, the evidence also showed that Fine's trip came about when, late in May, 1961, he telephoned Bottone, told him he was going to Italy to inspect the analytical facilities of Ankermann, told him he needed transportation, and said Cancelarich had advised that Bottone would arrange such transportation. Bottone told Fine to come to his Pan-Med offices, which Fine did (1512, 1584). Petitioner then drove Fine to Idlewild Airport and bought Fine's plane ticket (1515). During the drive to the airport Fine "told Bottone that I had the six analytical standards, the four antibiotic cultures and the engineering forms that John Cancelarich requested and that I was going to inspect and evaluate the analytical facilities" at Ankermann (1512, 1515).

But there was nothing in that conversation to apprise Bottone of any unlawful aspect in Fine's possession or acquisition of those materials. Fine had obtained the analytical standards from Joseph Gerace, at Cancelarich's request, and the cultures from a William Schafer. Fine

had earlier given to Schafer the culture collection Fine had received from Cancelarich, who had said it was Fox's (843, 1588). There was nothing, however, to show that any of these facts were known or disclosed to Bottone.

Cancelarich himself testified that he never told Marpurgo that he was dealing in stolen cultures (1319), and there was no showing as to the source of any microorganisms or procedures intended to be supplied by Cancelarich to Marpurgo, or whether they were ones which had been stolen. Marpurgo was not named as a defendant or co-conspirator in the indictment. Moreover, Fine testified that in December 1961, when he saw Bottone at Pan-Med, Bottone told him that "Dr. Marpurgo has absconded with the $10,000 from MIBA" and that if Fine wanted his share, he "should sue Marpurgo" (1538).

As to count 9, it appeared that, in September 1961, a few days before leaving on a trip to Europe, Bottone mentioned to Sharff that he was going to Europe on business. Sharff asked him if he would take along a package to Wawretschek, and Bottone said he would.

At that time Bottone knew as a result of the tour of the Ankermann plant conducted by Wawretschek a year earlier (*supra*, p. 9), that Wawretschek had a problem with Ankermann's lyophilization facilities and Salb had agreed to have some of Ankermann's cultures lyophilized by the public depository of the ATCC (2435-39). Also, others in Italy had on occasion asked Sharff or Salb to get them some cultures from public depositories in the United States (2427-28). The evidence showed that Bottone was aware that Biorganic had ordered and received a number of lyophiliz-

ations of TC, CTC and DMCTC cultures, from a public depository (ATCC) for a nominal charge, the bills for which Bottone delivered to Wawretschek at Ankermann in March and September 1961 (2440-44, 2473; Def. Exs. AD & AE). Bottone also testified that Sharff told him at the time that he, Sharff was sending to Wawretschek the cultures made from the organisms which Wawretschek had sent and which were lyophilized by the ATCC (2449-50, 2475).

Wawretschek testified that in September 1961 petitioner delivered "a small package" to him in Milan, Italy (695). Although the witness testified at first (through an interpreter), that when Bottone made the delivery he told the witness that the package was from Sharff and contained strains that came from Fine (695), Wawretschek thereafter stated that Bottone did *not* mention Fine's name or the source of the package, or say anything other than that he was delivering it for Mr. Sharff. The witness thus answered "yes" to the question, "Did he [Bottone] not at that time merely tell you that he had brought this package over at the request of Mr. Sharff and was merely delivering it to you?" (747), and he testified that Bottone said only that he was delivering the package from Sharff, and it was the cultures the witness wanted, or was expecting (748-49). The witness then said "What he [Bottone] said is 'Here is a package. I brought it. Mr. Sharff gave it to me to give to you' " (749). The witness could not remember what was in the package delivered except that "there were a few tubes with some slants in them" (696).

The Court of Appeals below, overlooking this evidence, stated that "in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for de-

livery to Wawretschek, telling him that the package contained strains coming from Fine" (App. A. *infra*, n. 3, at p. A-6).

Upon delivery of the package Bottone asked Wawretschek for a receipt for it but the witness refused to give it to him (751). On September 15, 1961 Sharff wrote a letter to Mrs. Wawretschek concerning the above delivery, stating that since Bottone was planning a trip to Milan earlier that month Sharff had asked him to make this delivery to Mr. Wawretschek (2751). Sharff then went on to state in that letter (Ex. J) as follows (2486-87):

> "Dr. Bottone has not returned yet, so I do not know what actually happened. However, he wrote a short letter to me in which he said he delivered the strains to your husband in accordance with instructions and gave him the receipt for his signature. Instead of signing the receipt, your husband tore it up and started yelling that it should have been delivered two months sooner. *Dr. Bottone knew absolutely nothing about this, since he was merely acting in the capacity of a delivery boy.*"

On or about December 13, 1961 small scale tests were made in the Ankermann laboratory on "the CTC culture" apparently contained in the package delivered by Bottone; large scale production was to be begun if those tests were successful (1426, 1431). The tests of that culture apparently proved the culture ineffective for production; CTC never went into production from this culture at Ankermann (1431). At the trial below Cancelarich acknowledged that in a confession-affidavit given by him on April 6, 1962 he had stated that the CTC sample delivered by Bottone to Wawretschek "was never used" (768, 1433).

The Ankermann venture was wound up, at a loss to Bottone, Sharff and Salb, by the beginning of 1962 (1231-32, 2204-05).

At the trial the Government also relied upon certain depositions Bottone had given between May and October 1962, in a civil proceeding in New Jersey, unrelated to the instant case, in an effort to prove that prior to Bottone's investment in Ankermann he had learned through Salvetti that Cancelarich was in possession of microorganisms stolen from Lederle, and that Cancelarich was to provide them to Ankermann in connection with that investment (e.g., 2759, 2761). Over objections by counsel, the Government introduced statements from those depositions in evidence on its direct case, and later cross-examined Bottone with the depositions and with certain "off-the-record statements" made during the same period of time by Bottone under questioning by Mr. Bate, the attorney who had conducted the deposition interrogations. It is this petitioner's position that those depositions and off-the-record statements were inadmissible against him (see *infra*, pp. 31-42).

Moreover, Bottone made it clear that whatever knowledge on his part might be indicated by the depositions, particularly as to what he may have learned from Salvetti, was not indicative of what he knew *prior* to the taking of those depositions in mid-1962, because "by that time I had learned of a lot of facts that I certainly didn't know earlier in 1961 or 1960" (2332). Further, Bottone testified, and the depositions themselves indicated, that when Bottone gave them he was confused as to certain matters, he made certain statements based on "rumors",

and he made errors, and thus made statements which were untrue (2265-2269).

In sum, and apart from the unreliability of the "facts" and dates in the depositions, although they dealt with the possession and sale of microorganisms and procedures for production of the drugs, there was no showing of knowledge on Bottone's part that any of the cultures or procedures being discussed, or to be supplied *by Salvetti,* had been *stolen,* or that any of the people Bottone was dealing with were in *possession* of any such *stolen* cultures, or that Cancelarich or Fine were to supply anything other than technical expertise.

There was no showing by the Government that Bottone was aware, during the time of the crimes alleged in the indictment, that *Salvetti* had at one time been associated with *Fox* in the sale of any Lederle materials or in any *unlawful* venture, and Bottone himself denied any such knowledge (2326, 2328).

Despite Bottone's denial on the stand that he knew of Salvetti's intent to supply cultures to Ankermann through Cancelarich, the trial judge charged the jury that "Bottone has *admitted* . . . that (he) knew what Salvetti was going to do with Cancelarich at Ankermann before he, Bottone, bought the stock" (2802), and that "It has also been *shown* that Bottone's investment in the Ankermann plant was made at a time when he was aware . . . of how Salvetti was going to use Cancelarich" (2825-26).

Certain additional facts are set forth below.

Reasons for Granting the Writ

1. As to the applicability of 18 U.S.C. §§2314 and 2315 to the transportation of intangible "trade secrets."

An important question of general applicability is here presented, concerning the scope and reach of 18 U.S.C. §§2314 and 2315.

As noted above (*supra*, p. 6), none of the multudinous documents transported in this case were documents which had been removed from Lederle. Except for one or two instances, they were not even actual copies of Lederle documents but consisted instead of "write-ups" of applicable procedures in Fox's, Fine's or Cancelarich's *own language*, based in part on the Lederle documents and in part on their *own experience*. Indeed, in a number of instances the documents consisted of nothing more than the embodiment of the "know-how" of Fox and Cancelarich. (323-4, 363-5, 406-10, 880, 1055-6). As the Court of Appeals below itself pointed out (App. A, *infra*, pp. A-7—A-8):

> "The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N.Y., take these to Fox' home within New York state, make photocopies, microfilms or notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce."

The Court of Appeals characterized the issue here presented as follows (App. A, *infra*, p. A-7):

> "The *serious question* is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce

> were 'goods' which had been 'stolen, converted or taken by fraud' *in view of the lack of proof that any of the physical materials so transported came from Lederle's possession.*"

The issue was squarely raised by defense counsel by objections to the admission of the foregoing documents in evidence and by motions to strike, and the District Court ruled that the documents constituted stolen "goods, wares and merchandise" within the ambit of 18 U.S.C. §§2314 and 2315 (902-10, 2151, 2154-7). The District Court's charge also permitted the jury to find defendants guilty solely on the basis of the transportation of such documents.*

It is petitioner's position that the phrase "goods, wares and merchandise" in the penal statutes here involved cannot be read to include "intangibles" or "know-how", especially in the light of the settled rule that penal statutes must be strictly construed (*Yates* v. *United States*, 354 U.S. 298, 304-6).

A criminal statute may thus not be broadened by judicial construction to bring within its purview "instances which are not embraced in the language employed in the statute,

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* Thus, the Court charged with respect to the substantive counts that it would be sufficient for the Government to establish a particular defendant's knowledge "that the culture *or* documents had been stolen" (2795). With respect to the conspiracy count, the Court charged that it was sufficient for the Government to establish that it was a part of the conspiracy "to do *any one*" of certain specified acts involving the unalwful transportation or receipt of the materials involved, and the jury could thereby well have understood that it was sufficient for them to make such a finding with respect solely to the "documents" referred to by the Court (2810-11). Indeed, the Court specifically stated that it was sufficient for the jury to find that one of the objects of the conspiracy was the unlawful receipt "of all *or a part* of the goods" refetred to by the Court (2811).

or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress." *United States* v. *Chase,* 135 U.S. 255, 261; *Fasulo* v. *United States,* 272 U.S. 620, 629; *Yates* v. *United States, supra,* 354 U.S. at 305.

It has been recognized even in civil cases that the natural and ordinary import of the phrase "goods, wares and merchandise" is such as to exclude "intangibles" from its scope. Thus, in *Lenroot* v. *Western Union Telegraph Co.,* 141 F. 2d 400 (2d Cir.), rev'd 323 U.S. 490, the Second Circuit had before it the question whether the word "goods" as used in the Fair Labor Standards Act, was sufficiently broad to include "intangibles" in the form of electric impulses through which telegraphic communications are transmitted. The statute before the Court specifically defined the term "goods" as meaning "goods * * * wares, products, commodities, merchandise, or articles or *subjects of commerce* of any character", the phrase "subjects of commerce" having been added by an amendment to the original statute. The Court of Appeals, in an opinion by Judge Learned Hand, held that the statute embraced "intangibles", but did so solely on the basis of the amendment which specifically expanded the scope of the term "goods" to include "subjects of commerce". Judge Hand stated as follows (141 F. 2d at 402):

> "Until . . . [the amendment] was made the subdivision had read: 'wares, products, commodities, merchandise or articles of commerce of any character.' So far as we can see, no more complete enumeration could have been made of every kind of '*tangibles*'; so that, when the Senate expanded the phrase to include, not only 'articles' of commerce, but 'subjects' of

> commerce, the opposition would have meant nothing, if it had not included 'intangibles'." (Emphasis in original.)

In approving the Second Circuit's interpretation of the term "goods" in the same case, this Court also specifically did so on the ground that "telegraphic subjects are clearly 'subjects of commerce' and hence . . . they are 'goods' under this Act . . ." See *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 502-3. This Court, however, reversed on the ground that the telegraphic transmission of "intangible messages" could not be regarded as the "shipment" of "subjects of commerce" within the meaning of the statute, since the term "ship", "not being artificially defined by statute, is from the ordinary speech of people" and "we do not ordinarily speak of ['intangible messages'] as being 'shipped'." (323 U.S. at 505-6).

Other applicable authorities have all been consistently to the same effect. *Sealy* v. *Mitchell*, 249 F. 2d 327, 331 (5th Cir.); *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2nd Cir.); *Mitchell* v. *Lublin, McGaughy & Associates*, 250 F. 2d 253, 257 (4th Cir.), rev'd on other grounds, 358 U.S. 207; *Bozant* v. *Bank of New York*, 156 F. 2d 787, 790 (2nd Cir.). See also Bartenstein, *Research Espionage: A Threat To Our National Security*, Food Drug Cosm. L.J., December 1962, p. 813 at 821; Liebhafsky, *Industrial Secrets and the Skilled Employee*, 38 N.Y.U.L. Rev. 324, 334 (1963).

The Court of Appeals in the instant case apparently similarly recognized that the statutory reference to stolen "goods, wares and merchandise" could not properly be applied to the transportation of stolen intangible ideas or "trade secrets" as such. It thus stated that "the statute

would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only *after* a boundary had been crossed" (App. A, *infra*, p. A-8).

The Court held, however, that the instant situation was different because here the thieves reduced the trade secrets to writing *before* crossing the boundary (App. A, *infra*, pp. A-8–A-9). But what the Court overlooked is the crucial circumstance that while the physical documents embodying such secrets could perhaps be regarded as tangible "goods", they can in no way fit the statutory description of *stolen* tangible goods, since, as the Court itself recognized, there was a "lack of proof that any of the physical materials so transported came from Lederle's possession (App. A, *infra*, p. A-7).

It is no answer to say, as the Court of Appeals has here done, that "the physical form of the stolen goods is secondary in every respect to the matter recorded in them" (App. A, *infra*, p. A-8). For the emphasis thus placed on the stolen nature of the *intangible ideas* embodied in the transported documents, is flatly inconsistent with the basic premise that the statutory term "goods" does not embrace intangibles. The added fact, emphasized by the Court (App. A, *infra*, pp. A-7—A-8), that such documents were prepared with the aid of actual Lederle documents feloniously removed from Lederle and returned thereto, is likewise of no materiality, since there is no claim that there was ever any transportation in commerce of any actual Lederle documents.

In short, the Court below concluded that a situation like that here presented *should* be embraced by the statute. But

the question is, not what the scope of the statute *should* be, but what it *actually is*, construed in the light of the language deliberately chosen by Congress and the settled canon of strict construction of penal statutes (*Yates* v. *United States*, *supra*, 354 U.S. at 304-6). If any extension of the reach of the statute be deemed in order, it is axiomatic that the remedy therefor lies with Congress, not with the courts.

Nor may the question here presented be avoided on the basis of the alternative conclusion of the Court of Appeals that "the judgment may stand even if the statute does not reach far enough to include the copies and notes" (App. A, *infra*, p. A-9). It reached that conclusion primarily on the ground that the question presented affected only counts 8 and 10, as respects this petitioner, and that since petitioner had also been convicted on count 9 and concurrent sentences had been imposed, the judgment could be affirmed on the basis solely of the latter conviction (*id.*, pp. A-9—A-10).

The Court acknowledged that error on one count may not properly be overlooked on the basis of a concurrent sentence on a valid count, where the error is such that it might have prejudiced the defendant in respect of "the results of the proceedings" or the length of the sentence imposed on the latter count (*id.*, p. A-10). See also *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402. The Court held, however, that the error here claimed was not of that character since it affected only the jury's appraisal of the value of the "goods" transported, and since (a) the requirement of the governing statutes that the "goods" be "of the value of $5,000.00 or more" did not affect any "legitimate interest" of the defendant but was rather designed only "to avoid overtaxing the Department of Justice", and (b)

the jury might and probably would have convicted in any event (App. A, *infra*, p. A-10). The Court thereby, however, in effect read out of the Congressional legislation a distinct jurisdictional limitation specifically mandated by Congress—a limitation deemed so important that Congress went to pains to define even the standard of value to be applied in such cases (18 U.S.C. §2311). The Court further ignored the settled rule "which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." See *Yates* v. *United States*, *supra*, 354 U.S. at 312.

Moreover, in a case of such length and complexity as that at bar, involving hundreds of pages of highly technical testimony and scores of exhibits, the voluminous documents put in evidence by the Government inevitably permeated the entire case and amounted to such a massive assault on the senses of the jury that it cannot be maintained that there is no "reasonable possibility" that the error here complained of in respect to such documents "might have contributed to the conviction" on count 9, as well as on the other counts. *Cf. Fahy* v. *Connecticut*, 375 U.S. 85, 86-7. Further, the Court of Appeals itself noted that the District Judge's "remarks on imposing sentence show that he viewed defendants' activities as a whole" (App. A, *infra*, p. A-11), and he might well have imposed a substantially shorter sentence on petitioner if the latter had been acquitted on counts 8 and 10 and convicted only on the basis of the single episode involved in count 9. See also the discussion as to the claimed insufficiency of the evidence on count 9 (*infra*, pp. 50-54).

2. As to the statements secured from petitioner after the Government investigation had focused upon him.

The highly important constitutional question here raised presents a further phase in the development of the *Massiah-Escobedo-Miranda* doctrine.

As has been noted (*supra,* p. 22), the Government used against petitioner at the trial certain statements obtained from him in the course of depositions conducted by the Merck Company in a separate civil action and through off-the-record interrogation of petitioner by Merck's attorney. Some of the statements were introduced in evidence as part of the Government's direct case; other portions were used by the Government in cross-examination of petitioner.

Petitioner's counsel objected to the admission in evidence of the statements adduced in the depositions on the basis of the Fifth Amendment privilege against self-incrimination, noting that the depositions had been obtained under subpoena (2003-4). Counsel also objected to the use in cross-examination of the memoranda of the off-the-record questioning of petitioner by Merck's attorney on the ground that petitioner was not represented by counsel during such questioning (2366-8, 2374-5). It also appeared that petitioner was not represented by counsel during a substantial portion of the taking of the depositions (2415).

The crucial nature of the evidence derived from the statements here in question is illustrated by the following excerpt from the trial court's charge to the jury (2825):

> "The government's case against Bottone rests on the knowledge he acquired from Salvetti concerning what was going on concerning these cultures and

processes and Salvetti's relationship with Fox and then with Cancelarich and the Kim boys. This knowledge is found in Bottone's statement in the Merck case in New Jersey [the depositions] and Mr. Phillips' testimony on this trial."

The depositions were voluminous and filled some 18 volumes (2405), and comprised some 400 hours of testimony (2414). They were taken during the months from May until just prior to petitioner's indictment in October of 1962 (2003, 2414, 2416-7). The off-the-record questioning filled some 10 volumes and was conducted over a period beginning June 29, 1962 and continuing through the remaining period during which the depositions were taken (2405-6, 2371).

The depositions were ostensibly taken in connection with a civil suit by the Merck Company against Bottone and his Pan-Med company, for an injunction and damages for alleged patent infringement of one of Merck's products known as Vitamin B-12 (2408-9, 2411, 2415). The suit resulted in a consent decree adjudging Bottone in contempt and awarding damages against him in the sum of $100,000 (2406-07). The Merck Company then entered into an agreement with Bottone dated May 14, 1962, which provided in essence that Merck would accept a payment of $15,000 from Bottone in satisfaction of the $100,000 judgment, provided that he would give a "frank and complete disclosure in depositions under oath of all matters and things within his or . . . [Pan-Med's] knowledge concerning" a specified list of subjects (2407-10). The agreement was conditioned on Merck's "being satisfied of the completeness and frankness of the aforesaid disclosures" (2412-13).

The agreement recited that "Merck believes that Bottone and Panmed have valuable information concerning the activities of various persons and entities in the field of importing, producing, selling and distributing drugs" (2408). The agreement then recited the matters as to which Bottone was to give "frank and complete disclosure", including the matters of improper customs declarations, counterfeiting, mislabeling, *sales by Bottone or any of his organization, associates or others of drugs in the United States or foreign countries, production* in the United States or *overseas of drugs using American know-how or process information,* and persons, associations or companies *engaged in the foregoing* (2411-12).

The agreement was amended by another agreement dated June 20, 1962 between Merck, Bottone and Pan-Med, providing that Merck would be entitled to 293 actual hours of depositions, if the same were required for a "full and complete disclosure of matters defined in the aforesaid agreement". The amendment also noted that up to that date only 60 hours and 22 minutes of depositions had been given, thus revealing that the greater proportion of the 18 volumes of depositions were given from that date through October 1962 (2416-17).

At the time of the interrogation of this petitioner by the attorney Bate, the latter's law firm, Shanley & Fisher, represented American Cyanamid in New Jersey, as well as Merck (2405, 2407). That interrogation, both in the depositions and in the off-the-record questioning, extended far beyond the Vitamin B-12 situation which was the subject matter of the Merck suit, and was clearly designed to uncover and develop evidence for use in the instant prose-

cution, the interrogation specifically including matters which related solely to the theft and transportation of cultures and other property of American Cyanamid underlying this prosecution.

The evidence showed that during the months in which these 28 volumes of statements were taken, and well before their conclusion in October 1962, this petitioner had become a "target" of the Government investigation which culminated in the indictment herein and that the investigation had "focused" upon him as a potential defendant in this case. The evidence further showed that during the period when the statements were taken, and commencing even prior thereto, American Cyanamid, through its attorneys and other representatives, was working closely with the Government for the purpose of obtaining evidence for use in the prosecution of the charges here involved.

It was clear that the attorney Bate, whose law firm represented American Cyanamid as well as Merck, was not interrogating petitioner between May and October 1962, in a "vacuum", without knowledge or contact with the Government, either directly, or indirectly through American Cyanamid, particularly in view of the fact that Bate was aware of the F.B.I.'s activities at least as respects Salvetti (2417-19). The inescapable inference under the circumstances is that Bate was surreptitiously acting as a *de facto* agent for the Government, after the Government's investigation had "focused" on petitioner, to secure evidence for use by the Government against the latter.

Any participation by the Government, whether directly or indirectly, in the interrogation of petitioner by Merck's attorneys under the pressures and processes of Merck's civil

litigation, after petitioner had become the target and focus of the Government's investigation would clearly run afoul of the doctrine of the *Massiah* and *Escobedo* cases (*Massiah* v. *United States,* 377 U.S. 201; *Escobedo* v. *Illinois,* 378 U.S. 478). In *Massiah* it was the surreptitious interrogation of the defendant by a co-defendant, without advising him that the questioning was being pursued for the purpose of securing evidence for the Government, and without apprising him of his constitutional rights to remain silent and to the aid of counsel, that was held to be particularly objectionable (377 U.S. at 206). The same vice was also present here, where petitioner was interrogated, to a large extent in the absence of counsel, and ostensibly for the purposes of a civil litigation, but actually, without his knowledge, for the purpose of securing evidence against him for the Government, for use in the instant prosecution.

The rationale of the Court below that petitioner was "free to claim" his privilege against self-incrimination in the interrogation by Merck "on penalty only of foregoing the financial advantages that performing his agreement to talk would entail" (App. A, *infra,* p. A-12), overlooks the fact that petitioner was never apprised of the purpose of the interrogation, to secure evidence for the Government, and that the deception thus practiced upon him operated to deprive him of any effective opportunity to assert his constitutional rights. Manifestly, an accused cannot be regarded as "free" to claim the privilege when he is tricked into not doing so, particularly where, as in this case, the deception is accomplished through the pressures entailed in the threatened enforcement of a substantial contempt judgment against the accused.

In *Miranda* v. *Arizona*, 384 U.S. 436, 444, this Court declared that the *Escobedo* doctrine is applicable not only where an accused has "been taken into custody" but also where he has been "otherwise deprived of his freedom of action in any significant way". An accused who is interrogated under pressures such as those exerted in this case is certainly "deprived of his freedom of action in . . . [a] significant way".

The Court below went so far as to rule that petitioner was without remedy "even if Merck's attorney were working with the Government" (App. A, *infra*, p. A-12). The ground on which it sought to distinguish the *Massiah* case —i.e., that in *Massiah* the defendant was already under indictment (*id.*, p. A-12)—cannot be squared with the holding of *Escobedo* that the principles applied in *Massiah* are equally applicable even though the accused has not yet been indicted, so long as the Government's investigation has focused upon him and the accusatorial process has thereby begun.

It is further submitted that even if Merck's interrogation of petitioner was conducted without the knowledge, participation or acquiescence of the Government, the statements thereby obtained from him were unavailable to the Government, since they were extracted through pressures and promises rendering them involuntary, and to a substantial extent in the absence of counsel, and by means of subterfuge and deception. The same considerations which call for an exclusionary rule where the Government participates or acquiesces in such objectionable methods of obtaining evidence, are equally applicable where such methods are employed, as here, by a complainant actively en-

gaged in promoting and assisting the Government investigation and prosecution.

Constitutional guarantees could well be rendered meaningless if the Government could blandly adopt for its use in a criminal prosecution the fruits of improper investigatory activities by complainants actively engaged in gathering evidence for it. The situation is comparable to that which was condemned by this Court when it overruled the so-called "silver platter doctrine" and applied a flat exclusionary rule against the use in a Federal court prosecution of evidence tainted by reason of having been obtained in violation of the defendant's rights, albeit by persons other than Federal officials, and without any participation therein by the Federal Government. See *Elkins* v. *United States*, 364 U.S. 206; *Benanti* v. *United States*, 355 U.S. 96.

There is nothing in the record to support the conclusion of the Court below that it is "fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck" (App. A, *infra*, p. A-12). The Court's further statement that "a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished" (*id.*, p. A-12), ignores the crucial fact that Bottone was deprived of the effective assistance of counsel to protect his constitutional rights, especially as respects that half of the interrogation conducted in the absence of counsel, because neither Bottone nor the attorney was apprised of the intended use, for criminal prosecution purposes, of the answers that Bottone would give in that interrogation.

3. As to the trial court's failure to hold a full hearing concerning the statements obtained from petitioner or to submit to the jury the issue of the voluntariness of such statements.

The question here presented is auxiliary to Question 2, *supra*. If it were to be held that the Government was not foreclosed from using the statements here involved in this prosecution, in the absence of a direct showing that the Government itself had a part in obtaining the statements, petitioner was at least entitled to a hearing to determine the full factual context in which the statements were given and to ascertain whether the Government approved or acquiesced in the attorney Bate's investigatory activities in its behalf. *Cf. Townsend* v. *Sain*, 372 U.S. 293, 313-14, 320-22; *Jackson* v. *Denno*, 378 U.S. 368, 391-2; *Boles* v. *Stevenson*, 379 U.S. 43, 45; *Henry* v. *Mississippi*, 379 U.S. 443, 448. The principle applied in the latter cases is that where the record indicates a violation of a defendant's constitutional rights in connection with the use in evidence against him of a confession or of the fruits of an unreasonable search and seizure, the defendant is entitled to a full evidentiary hearing on the matter, even where the record suggests that counsel might not have entered a specific exception or objection. See, especially, *Henry* v. *Mississippi*, *supra*, 379 U.S. at 448-9; *Boles* v. *Stevenson*, *supra*, 379 U.S. at 111. *Cf.* also *Campbell* v. *United States*, 365 U.S. 85, 94-6, 98.

As has been noted, at the time of the interrogation of this petitioner by the attorney Bate, the latter's law firm, Shanley & Fisher, represented American Cyanamid in New Jersey, as well as Merck (2405, 2407). The trial court, however, rejected a proffer of proof by co-defendant's counsel to show, through Bottone's testimony, additional circum-

stances surrounding that interrogation of Bottone by Bate, that Bate sought to put pressure on Bottone to obtain evidence against his co-defendants by stealing records from Biorganic and by secretly obtaining incriminating statements from the co-defendants through concealed wire recording apparatus (2422-3). The trial court ruled that any evidence with respect to any pressures exerted upon Bottone would have to be developed by calling Bate as a witness (2421-2).

The failure of the Courts below to grant petitioner an evidentiary hearing with respect to the issues of the voluntariness of the statements obtained from him, lack of counsel and self-incrimination, overlooks the principles so recently re-emphasized by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719, and *Davis* v. *North Carolina*, 384 U.S. 737. In *Johnson*, this Court, while declining to give retroactive effect to its decisions in *Miranda* and *Escobedo*, stated as follows (384 U.S. at 730-1):

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia*, 372 U.S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate*, 367 U.S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959). Prisoners are also *entitled to present evidence anew on this aspect of the voluntariness of their confes-*

sions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain,* 372 U.S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, *the non-retroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.*

"... past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See *Haynes* v. *Washington, supra; Spano* v. *New York, supra.*"

And, "allegations of this kind (denial of counsel) are directly relevant to a coerced confession claim and ... such a claim presents no problem of retroactivity". 384 U.S. at 735.

In *Davis* v. *North Carolina, supra,* involving a pre-*Miranda* trial, this Court also stated (384 U.S. at 740-1):

"... the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made ... Thus, the fact Davis was never *effectively* advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

Furthermore, petitioner was entitled to the submission to the jury of the issue of the voluntariness of the statements obtained from him by Merck. This Court has thus declared that the admissibility in evidence of a confession obtained

from an accused depends on whether it is the accused's "free and voluntary" act and that it "must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence". See *Malloy* v. *Hogan,* 378 U.S. 1, 7 and cases there cited. Manifestly, just as the Government was foreclosed from obtaining any incriminating statement from petitioner through pressures or promises directly made by it, it could not do so indirectly through Merck.

The issue of voluntariness was squarely presented in this case, and it was incumbent on the trial court to submit that issue to the jury, even though the Court may have determined that there was no basis for excluding the statements as involuntary as a matter of law. See *Jackson* v. *Denno, supra,* 378 U.S. 368, 378 (fn. 8, 400; *United States* v. *Lustig,* 163 F. 2d 85, 88-9 (2d Cir.), cert. den. 332 U.S. 775; cf. *United States* v. *Simmons,* 281 F. 2d 354, 356-7 (2d Cir.).

The prosecutor, in his summation to the jury, urged that there was no issue as to the voluntariness of the statements. He thus stated (2688-9):

> "I want to point out one other thing: There has been this claim that Merck and American Cyanamid have been persecuting people, and certain statements were made about that, and I do think something should be said by me about that. * * *
>
> "Merck & Company did not put a gun to Dr. Bottone's head and force him to sign a judgment for $100,000. This was arrived at during the course of litigation and he voluntarily consented to provide certain information rather than pay the money that was adjudicated he owed to Merck & Company. These are not the issues in the case, ladies and gentlemen;

the issues in the case are the facts which you have heard from the witnesses you have seen."

The trial court made no mention in its charge of any issue with regard to the voluntariness of the statements, and failed to instruct the jury that they could consider the facts surrounding the taking of the depositions and the off-the-record questioning of petitioner by Merck's attorney in passing upon the voluntariness of the statements thereby adduced from him. On the contrary, the trial court specifically instructed the jury that the essential element of petitioner's guilty knowledge "is found in Bottone's statement in the Merck case in New Jersey", without any mention of the issue as to the voluntariness thereof (2825). In view of the prosecutor's summation, and in view of the silence of the charge as to this matter, the jury was undoubtedly given the impression that there was no issue as to voluntariness, and the trial court's failure to charge on the subject amounted to a withdrawal of that issue from the jury, and thus commission of "plain error" under Rule 52(b), Fed. Rules Cr. Proc. *Cf. United States* v. *Raub,* 177 F. 2d 312, 315-16 (7th Cir.).

4. As to the governing standards for the determination of "value".

An important question is here presented, involving a conflict among the circuits, relating to the interpretation of the standards laid down in 18 U.S.C. § 2311 for the determination of "value" for the purposes of prosecutions under 18 U.S.C. §§ 2314 and 2315.

Under 18 USC §2311, the term "value" for purposes of prosecutions under 18 U.S.C. §§2314 and 2315 is defined as follows:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

In *Abbott* v. *United States*, 239 F. 2d 310 (5th Cir.), involving a prosecution for the unlawful transportation of photostats of geophysical maps, the Court held that the Government had failed to establish the requisite element of a value in excess of $5,000 because of its failure to show either a market, or a market value, for the materials involved, as required by 18 U.S.C. §2311. The Court there further held that it was error to permit testimony, on the question of value, as to the cost to the company for the geophysical exploratory work represented by the maps "or its 'value' to oil lease traders and promoters working up trades for that area", since even if such evidence served to show "intrinsic or actual value, . . . it was certainly not market value" (239 F. 2d at 312).

The Court further stated (239 F. 2d at 313):

> "Congress plainly restricted value to three well-understood standards. Mere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain special circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers."

In the present case, on the other hand, the District Court permitted the jury to consider, over motion to strike (2166, 2178), extensive evidence as to the cost of production, the

cost of replacement, and the value to Cyanamid, of the latter's cultures and procedures, as well as evidence relating to the element of secrecy with respect thereto. The admission of such evidence was directly contrary to the standards laid down in *Abbott* v. *United States, supra.*

The trial court further admitted evidence, over motion to strike (2166, 2178), showing the amounts offered by other companies in Europe for cultures and processes of the *type* here involved, even though there was no proof that the particular cultures and processes involved in those transactions were the same as those actually dealt in by the defendants herein. Manifestly, no sufficient foundation was laid to establish the relevance of such evidence, in view of the absence of a showing that the transactions with such other companies related to cultures or "documents" substantially the same as those involved in this case. A further objection to such evidence was that the value of such materials to a particular buyer could well turn on "special circumstances" affecting such buyer (cf. *Abbott* v. *United States, supra,* 239 F. 2d at 313). The evidence here thus showed that marketable drugs could be produced with materials of the kind here involved only under the special circumstances of there being available to the purchaser a special type of plant with special equipment for precise control of the processes and precise data for such control (1803-4, 1952-3, 2043).

The District Court indeed charged the jury that in determining value they could consider the transactions that were testified to involving other companies, even though such transactions were not consummated (2793-4). The Court further charged the jury that they could consider "the cost

to American Cyanamid for the development of the various organisms and the documents dealing with manufacturing procedures'' (2794), even though, as pointed out below (*infra*, pp. 51-4), the particular organisms involved in this case were not shown to have been effective or of any value, and even though the ''documents'' here involved were for the most part not even copies of Lederle documents. The Court also charged the jury that they could consider ''the secrecy attendant upon this work and the desires of other people to obtain the results of this work'' (2794).

The standards thus applied by the District Court do not comport with the definition of value set forth in the statute. Cf. *Abbott* v. *United States, supra*, 239 F. 2d at 312-13.

The Court of Appeals below, however, declined to follow the decision of the Fifth Circuit in *Abbott*, stating that ''we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55'' (App. A, *infra*, p. A-7).

While the Third Circuit Court of Appeals in *United States* v. *Lester*, 282 F. 2d 750, held, with respect to geophysical maps, that ''any reasonable method'' could be employed to determine the value of an item not having a market value, it is submitted that the decision in *Abbott* v. *United States, supra*, is more in consonance with the language of the governing statute and should here be followed. Further, in the *Lester* case, there was testimony by expert witnesses that the aggregate value of the stolen maps ''was well over $5,000'' (282 F. 2d at 754). There was no comparable evidence in the instant case.

5. As to the insufficiency of the evidence of guilty knowledge on the part of petitioner.

It is submitted that the holding of the Court of Appeals below on the question of the sufficiency of the evidence adduced to show petitioner's knowledge that the materials involved in this case had been stolen, or stolen from Lederle, on its face directly contravenes the principle enunciated by this Court in *Ingram* v. *United States*, 360 U.S. 672, is contrary to the uniform holdings of other circuits in analogous situations, and, indeed, is based on sheer speculation.

In *Ingram*, this Court reversed the convictions of two petitioners (Smith and Law), on the ground that the evidence as to them was legally insufficient to show that they had certain knowledge requisite for conviction there, to wit, knowledge that their employers were liable for federal taxes by reason of certain gambling operations in which Smith and Law had participated. In that case, as here, the record was barren of any direct evidence of the requisite knowledge on the part of the two employees whose convictions were reversed. This Court held that the essential element of knowledge was not established by the Government's showing that the two functionaries were actively engaged in the gambling operations there involved and that they conducted such operations furtively and in secret. The Court stated in part as follows (360 U.S. at 680):

> "Evidence that Smith and Law might have wanted the taxes to be evaded *if* they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes *if* they had known of them, is *not* evidence that they *did* know of them.
>
> * * * * *

> "... to establish the (element of criminal) intent, the evidence of knowledge must be clear, not equivocal."

The evidence adduced as to petitioner was summarized by the Court of Appeals below in its opinion (App. A, *infra*, p. A-5, n. 3; and see *supra*, pp. 15-21). As the Court there acknowledged (App. A, *infra*, p. A-5), the Government adduced no direct testimony that Bottone was aware that the Lederle materials had been stolen therefrom and, although the Government relied heavily upon certain statements made by the thieves at a meeting on April 14, 1961 to show the requisite knowledge on Bottone's part, "it was not proved that this was heard by Bottone, who arrived late." (App. A, *infra*, n. 3, at p. A-6). The Court held, however, that the Government met its burden of proving the requisite guilty knowledge on Bottone's part through "the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad, of both cultures and participants"—or, as the Court summarized it, "all this evidence of his comings and goings" (App. A, *infra*, pp. A-5—A-6).

The Court's own above-quoted characterization of the evidence demonstrates its insufficiency to establish the vital element of guilty knowledge. As in *Ingram*, so here, evidence that petitioner "might have" conducted himself as described "*if* (he) had known" that the materials had been stolen, or that he "engaged in conduct which *could* have been in furtherance of a plan" as alleged in the indictment "if (he) had known" of such plan, "is *not* evidence that (he) *did* know" such facts. *Cf. Ingram* v. *United States*, *supra*, 360 U.S. at 680.

Indeed, the clear implication of the reasoning of the Court below here—that petitioner's "comings and goings" constituted sufficient evidence upon which to infer the requisite guilty knowledge on his part—is directly analogous to a Government argument rejected in *Ingram*.

The Government thus argued in *Ingram* that the evidence showing that Smith and Law were intimately connected with the lottery operation itself, that they cooperated in conducting it secretly and that they had knowledge that the operation was conducted at a profit, circumstantially proved that they knowingly aided in the avoidance of their employers' gambling tax liability. Rejecting that contention, this Court held that "these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge. This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted." (360 U.S. at 679.)

Similarly, in the instant case, the evidence of Bottone's "comings and goings" fails to meet the test of being that "clear, not equivocal" evidence which is required as a predicate for a permissible inference of the requisite guilty knowledge and intent. Bottone's activities were not "reasonably explainable only in terms of" his knowing that stolen Lederle materials were being dealt in; on the contrary, the circumstances of his activities render them "actually . . . colorless as to the vital issue of knowledge" on his part that such materials were being deal in.

It has likewise been uniformly held in other circuits that a finding of a defendant's guilty knowledge may not rest upon speculative inferences or possibilities, and that evidence which serves merely to create "a strong suspicion" of such guilty knowledge is not sufficient for that purpose, particularly where there is a reasonable explanation for the defendant's actions equally consistent with the absence of such knowledge: *Call* v. *United States,* 265 F. 2d 167, 172 (4th Cir.); *United States* v. *Hamrick,* 293 F. 2d 468, 470-471 (4th Cir.); *Brumbelow* v. *United States,* 323 F. 2d 703, 705 (10th Cir.); *Jehl* v. *United States,* 127 F. 2d 585 (9th Cir.); *Karchmer* v. *United States,* 61 F. 2d 623 (7th Cir.); *Neal* v. *United States,* 102 F. 2d 643 (8th Cir.).

It has thus been held that an inference of guilty knowledge may not be drawn merely on the basis of a showing that the evidence indicated a *possibility* that the defendant had been apprised of the underlying facts by a co-defendant (*Call* v. *United States, supra,* 265 F. 2d at 172); or that the defendant was engaged in other illegal activities in association with the other defendants (*Call* v. *United States, supra; Duke* v. *United States,* 233 F. 2d 897 [5th Cir.]); or that he had general knowledge of the situation (*Fulbright* v. *United States,* 91 F. 2d 210, 213 [8th Cir.]); or that he had dealings involving the stolen property and derived personal gain therefrom (*Gable* v. *United States,* 84 F. 2d 929, 930 [7th Cir.]); or that he made contradictory statements relating to the circumstances surrounding his dealings (*Fulbright* v. *United States, supra,* 91 F. 2d at 213). The courts have similarly consistently rejected any concept of "guilt by association". See *Glover* v. *United States,* 306 F. 2d 594, 595 (10th Cir.) and cases there cited.

The evidence showed that legitimate independent development of the pharmaceuticals here involved was perfectly feasible and that, so far as petitioner was concerned, the various cultures shown to have been dealt in by the witnesses and the other defendants could have been independently developed from samples legitimately obtained from a public depository; and there was nothing whatever to show that petitioner knew that such cultures had been stolen from Lederle (see *supra*, pp. 12-13, 14). The Government's entire case against petitioner Bottone rested on nothing more than sheer speculation and on piling "inference upon inference", in each instance drawn from evidence which is at best "equivocal" and not at all "clear" (*Ingram* v. *United States, supra,* 360 U.S. at 680), and which is "equally consistent" with Bottone's not possessing the requisite guilty knowldege. *United States* v. *Reina,* 242 F. 2d 302, 306 (2d Cir.).

6. As to the evidence required to prove the value of a pharmaceutical culture in a prosecution under 18 U.S.C. §2314.

An important question of general applicability is here presented relating to the proof necessary to establish the essential element of "value" in a prosecution, under 18 U.S.C. § 2314, for transporting stolen "goods," where the value of the goods involved is determined by its condition at the time of its transportation.

Count 9 of the indictment charged petitioner Bottone with having unlawfully transported a quantity of stolen CTC producing microorganisms of a value of $5000 and more, in foreign commerce, from New York to Milan, Italy, in September 1961, with knowledge that the same had been

stolen. As indicated above (pp. 29-30), the Court below held that, even if error was committed as to counts 8 and 10, the judgment could stand on the basis of the conviction on count 9.

There was however an absence of legally sufficient evidence to show that the package which Bottone delivered contained a microorganism having any value, much less a value of $5000 or more, at the time of the transportation in September 1961, quite apart from the failure of proof on the issues of whether it was in fact a Lederle organism which was stolen or transported, and, if so, whether Bottone knew it to be such. There was thus no evidence to show that the certain mash sample which Gerace had stolen in July 1961, and which the Government maintained was the source of the culture transported as alleged in count 9, actually contained any live organisms, no test having been made to determine the presence, viability or potency of any microorganism content. The witness, Fine, who transmitted the mash from Gerace to Sharff, himself had no way of knowing whether what he had obtained from Gerace was a live CTC culture (1614-1615).

In fact, the evidence affirmatively showed that, without a test, there was no way of knowing whether there were any live cultures in the mash sample taken from Lederle by Gerace and given by him to Fine. The Government's own "expert" witness, Dr. Scholz of Lederle, thus testified that the cultures in the mashes are "not necessarily" growing there, "They might be dead. It might be a kill culture" (1988-89). Fox similarly testified that, even as to "lyophiles" of CTC cultures at Lederle it was possible that among them were cultures which were "not good" (518, 520).

Furthermore, even if it were to be assumed that the mash sample stolen by Gerace from Lederle contained valuable microorganisms at the time of the initial taking, there was an absence of evidence to establish that such microorganisms were still in good condition at the time that the package allegedly containing them was delivered to Bottone in September 1961. The Government witness Fine testified that at the time that he delivered the sample to Sharff he actually did not know whether it was still effective (1642). He further testified that CTC mash samples, such as he delivered to Sharff, could be fatally contaminated by contact with the air, and that it was possible that the sample which he testified he delivered to Sharff in July 1961 was contaminated (1642). The evidence also showed that unless the mash sample were immediately properly preserved, the material would die and be completely worthless, within six hours, even if kept in a refrigerator; that the proper steps had to be taken "at once" for preservation of the material or "the sample would be destroyed" (2750, 2751). Prior to lyophilization the material had to be kept in a "deep freeze" (2751). The danger to these delicate microorganisms was also illustrated by the prior experience in dealing with them; thus, on many occasions microorganisms furnished by Biorganic to Ankermann had proved to be poor by the time they reached Ankermann and provided low yields occasioning frequent complaints by Wawretschek (688, 733).

As regards the particular mash sample stolen by Gerace, the evidence showed that the sample was handled in such a manner that it could well have been fatally contaminated by contact with the air by the time it reached Sharff. Gerace thus left the sample on his laboratory bench for an indeter-

minate time until he left work on the day of the taking; he then carried it home in his pocket in the hot July weather; and there was further handling of the sample by Fine, without refrigeration, until he delivered it to Sharff (1735-36, 1639). There was likewise no showing that Sharff had taken the requisite steps for the proper preservation of the material after it had been turned over to him by Fine. The Government contended that it could be inferred that Sharff had, in accordance with his practice on other occasions, lyophilized the particular CTC microorganisms upon receiving the mash sample from Fine. There was nothing, however, to show that the microorganism was still alive when Sharff received it, or whether he did actually lyophilize it, or whether there was any lapse of time prior to any lyophilization, or whether the lyophilization was properly carried out.

Further, the evidence showed that when the CTC microorganism apparently contained in the package transported by petitioner to Ankermann in September 1961, was tested on a laboratory scale by Cancelarich around mid-December 1961, with large scale production to follow if the tests were successful, that microorganism "was never used" and no CTC went into production from that source (*supra*, p. 21). Not only was there thus no evidence that what Bottone transported in September 1961 was then a valuable microorganism, but on the contrary what evidence there was showed that that microorganism was found to be unfit for production, and thus of no value, when tested in December 1961, and there was nothing to show that there was any change in the condition of the microorganism between the time of the transportation in September 1961 and the tests conducted in December 1961.

There was in short a complete absence of evidence to show that the package transported by Bottone contained microorganisms having any value, much less a value of $5000, at the time of the transportation. The Government's claim of value is based on nothing more than sheer speculation, since, as noted, there was no showing with respect to the condition of the microorganisms at any of the crucial times here involved, except for the evidence showing that the culture, upon being tested after its delivery by Bottone, demonstrated that it was unfit for production. At best, the Government's evidence would be no more than "equally consistent" with an inference that the damage occurred to the microorganisms at some point prior to the subject transportation as with an inference that such damage occurred between the time of that transportation and December 1961. See *United States* v. *Reina*, 242 F. 2d 302, 306 (2d Cir.); *Karchmer* v. *United States*, 61 F. 2d 623 (7th Cir.); *Brumbelow* v. *United States*, 323 F. 2d 703, 705 (10th Cir.).

7. Incorporation of Reasons for Granting the Writ advanced in petitions of co-petitioners.

As to the Question presented in the petition of co-petitioner Seymour Salb and Question 3 presented in the petition of co-petitioner Nathan Sharff, petitioner herein incorporates by reference the reasons advanced in such petitions for granting a writ of certiorari with respect to such Questions.

CONCLUSION

For all of the reasons advanced, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

FRIENDLY, *Circuit Judge:*

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

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[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethychlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

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[2] Joseph Gerace, a lesser accomplice, who also testified for the Govermnent, received a suspended sentence.

Number	*Charge*	*Appellants*
1	Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959.	Salb Sharff
8	Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961.	Bottone Salb Sharff
9	Transporting CTC culture from New York to Milan, Italy, on September 15, 1961.	Bottone Sharff
10	Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964.	Bottone Salb Sharff

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is suspectible of an innocent interpretation if it stood alone. The trier is entitled, in factbound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961); cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years, and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

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[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

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tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves,* 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester,* 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer,* 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States,* 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra,* 265 F. 2d at 880, and *United States* v. *Lester, supra,* 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States,* 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines,* 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash,* —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra,* 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2314, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois*, *supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

APPENDIX B

Statutes and Rule Involved

Title 18, United States Code, Section 2311:

"§2311: Definitions

As used in this chapter:

* * * * *

'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

Title 18, United States Code, Section 2314:

"§2314: Transportation of stolen goods, . . .

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, . . ., of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * *

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. * * * ".

Title 18, United States Code, Section 2315:

"§2315: Sale or receipt of stolen goods, . . .

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, . . . of the value of $5,000.00 or more, . . ., moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken;

* * * * *

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. * * * ”

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless Error and Plain Error

* * * * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

A petition for a rehearing having been filed herein by counsel for the appellant Caesar Bottone,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

Appendix E—Order Denying Petition for Rehearing In Banc

A petition for a rehearing in banc having been filed herein by counsel for the appellant Caesar Bottone,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Clerk